Public Prosecutor v Rames a/l Subramaniam

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-15 OF 2001(MTJ 3)
HELILIAH J
15 JULY 2008

Criminal Law — Dangerous drugs — Trafficking — Whether accused 'transporting' or 'delivering' drugs within definition of 'trafficking' — Whether drugs planted in car — Whether defence raised reasonable doubt — Whether there was gap in prosecution's case — Whether prima facie case established — Dangerous Drugs Act 1952 ss 2, 39B(2)

Evidence — Witness — Informer — Whether informer was agent provocateur — Whether informer's evidence corroborated

Acting upon information received from the informant who was arrested on 2 December 2000, the officers from the Jabatan Narkotik IPK, Kuala Lumpur decided to conduct an ambush. The information provided by the informant to the officer in charge of the ambush operation was that the accused, would be able to provide her with the drug heroin. The said officer then directed the informant to contact the accused by telephone both in the presence of himself and another Sub-Inspector, who was to be present as an interpreter, and to request for the drug. In the alleged telephone conversation between the informant and the accused, wherein the informant had referred to the drug as the *barang*, there was a request for the *barang* without disclosing the nature of the *barang*. However, in that conversation the accused had apparently requested for more time to deliver the *barang*. A few hours later the accused was alleged to have contacted the informant to inform her that the *barang* was available and that it would be delivered to the informant at an area at Jalan Aman, by the accused driving a white Proton Wira. On the basis of this information the ambush party lay in wait and apprehended a white Proton Wira bearing registration No NAT 7617 carrying two males and driven by the accused. Upon searching the car the ambush party found a plastic packet in the front passenger seat of the car, which was later analysed by a chemist to constitute a mixture of 8.26g heroin and 27.69g monoacethylmorphine, the dangerous drug. The accused was thereafter charged with trafficking in the dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the trial it was the prosecution's case that the accused had rented the car under an assumed name for a certain

period and that on the material date he was driving the car for the purpose of 'transporting' or 'delivering' the drugs within the definition of 'trafficking' as found in s 2 of the DDA. The co-passenger in the car gave evidence that the accused had received a call on his mobile while they had made a rest stop and that the accused had moved out of earshot during that brief conversation. He again gave evidence that during the course of their journey the accused had used the mobile phone for the purpose of a call. This evidence again corroborated the fact that on the way to the area identified for the delivery of the drugs a certain telephone conversation had transpired between the accused and the informant. In addition, the area that the accused had stopped at was the same place identified by the informant as the area where the drugs would be delivered to her by a person with the same name as the accused. At the end of the prosecution's case it was found that on the totality of the evidence a prima facie case was established and the accused was called upon to enter his defence. The defence of the accused, who elected to give his evidence under oath, was a denial namely a denial of having received a call from the complainant and of injecting the possibility that another person was involved. At the defence stage it was suggested that the informant went by another name and introduced the fact that she was married and that her husband was the other person who may have placed the drugs in the car. In the same vein it was also suggested that the car driven by the accused was not hired by him and that the actual hirer of the car, whose name appeared in the document tendered as evidence of the hire (the document), was lying when he gave evidence that the car was not hired by him (the alleged hirer) and that he had not signed the document. According to the accused, the car was not in his possession on the morning of 1 December 2000. He gave evidence that two Chinese men had met the accused and taken away the car on that morning. The defence also submitted that there was a gap in the prosecution's case because there was no definitive time that the accused could have placed the drug in the car where it was found. Therefore the defence concluded that the evidence was circumstantial and the burden heavier on the prosecution.

Held, convicting and sentencing the accused under s 39B(2) of the Dangerous Drugs Act 1952:

(1) The informant was akin to an agent provocateur because the police had used her to make a request for the drugs causing the accused to bring the drugs to the pre-arranged meeting place. The attempt by the accused to suggest that there were other persons who should be made available by the prosecution at the defence stage when nothing was denied at the stage of the prosecution's case appeared to be an attempt to create a form of fanciful doubt (see paras 14 & 41).

(2) When the person whose name appeared in the document for hire of the car (the alleged hirer) denied any knowledge of the hire and of signing the document of hire, no attempt was made by the accused to challenge the evidence and to ask for strict proof of the signature under s 67 of the Evidence Act 1950 ('the Act') at the prosecution stage. The defence had only raised the question of doubt about the signature during the examination-in-chief of the accused. All this was tantamount to an invitation to the court to reopen the prosecution's case. However, the notes of proceedings indicated that the evidence of the alleged hirer was accepted almost in toto. Again the court was only invited to consider s 73 of the Act at the end of the case for the defence. This in effect also pointed to a suggestion that the court should recall witnesses or even consider calling expert witnesses. However, the accused was unable to explain why the alleged hirer who was a friend of the accused would deny hiring the car (see paras 42–44).

(3) The evidence of the accused did not assist in casting any doubt on a balance of probabilities. The movements of the accused were consistent with the evidence of the informant that she was expecting the accused rather than the version of the accused that he at the instance of the informant's husband was delivering money to the informant. If so it did not negate the fact that the drugs were in the car. The contributing role if any of the informant's husband and the two unknown men who had taken possession of the car should have been elucidated at its earliest stage. The proximity and the nexus of the drug to the accused together with the circumstantial evidence indicated that the accused did intend to deliver the drugs as requested (see para 45).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima daripada pemberi maklumat yang ditangkap pada 2 Disember 2000, pegawai-pegawai polis dari Jabatan Narkotik IPK, Kuala Lumpur membuat keputusan untuk melakukan serang hendap. Maklumat yang diberikan oleh pemberi maklumat kepada pegawai yang mengetuai operasi serang hendap tersebut adalah bahawa tertuduh dapat membekalkan dia dengan dadah heroin. Pegawai tersebut kemudiannya mengarahkan pemberi maklumat tersebut menghubungi tertuduh melalui telefon di dalam kehadiran beliau dan seorang Sub-Inspektor yang lain, yang dikehendaki hadir sebagai penterjemah, dan untuk meminta dadah. Di dalam perbualan telefon yang didakwa di antara pemberi maklumat dan tertuduh, di mana pemberi maklumat merujuk kepada dadah tersebut sebagai 'barang', terdapat permintaan untuk 'barang' tersebut tanpa mendedahkan sifat 'barang' tersebut. Walau bagaimanapun, di dalam perbualan tersebut perayu secara jelas memohon untuk masa yang lebih untuk menghantar 'barang' tersebut. Beberapa jam kemudiannya

A tertuduh didakwa menghubungi pemberi maklumat untuk memberitahunya bahawa 'barang' tersebut ada dan bahawa ia akan dihantar kepada pemberi maklumat di kawasan di Jalan Aman, oleh tertuduh yang memandu kereta Proton Wira berwarna putih. Berdasarkan maklumat ini kumpulan serang hendap menunggu dan menahan Proton Wira berwarna putih yang B mempunyai No pendaftaran NAT 7617 membawa dua orang lelaki yang dipandu oleh tertuduh. Semasa menggeledah kereta tersebut kumpulan serang hendap tersebut menemui paket plastik di tempat duduk hadapan kereta tersebut, yang kemudiannya dianalisa oleh ahli kimia mengandungi campuran dadah heroin sebanyak 8.26g dan monoacethylmorphine sebanyak C 27.69g, dadah berbahaya tersebut. Tertuduh kemudiannya dituduh mengedar dadah berbahaya tersebut di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Semasa perbicaraan ia adalah kes pendakwaan bahawa tertuduh menyewa kereta tersebut di bawah nama samaran untuk tempoh tertentu dan bahawa pada tarikh material tersebut dia memandu D kereta tersebut untuk tujuan 'membawa' atau 'menghantar' dadah tersebut di dalam definisi 'mengedar' seperti yang didapati di dalam s 2 ADB. Penumpang di dalam kereta tersebut memberi maklumat bahawa tertuduh telah menerima panggilan di telefon bimbitnya semasa mereka berehat dan bahawa tertuduh telah beredar keluar dari jarak pendengaran semasa E perbualan pendek tersebut. Tertuduh sekali lagi memberi keterangan bahawa semasa perjalanan mereka tertuduh telah menggunakan telefon bimbitnya untuk tujuan panggilan. Keterangan ini sekali lagi menyokong fakta bahawa di dalam perjalanan ke tempat yang dikenal pasti tersebut untuk penghantaran dadah tersebut perbualan telefon tertentu telah berlaku di F antara tertuduh dan pemberi maklumat. Selanjutnya, kawasan di mana tertuduh telah berhenti adalah tempat yang sama dikenal pasti oleh pemberi maklumat sebagai kawasan di mana dadah tersebut akan dihantar kepadanya oleh seorang yang saman nama seperti tertuduh. Di akhir kes pendakwaan didapati bahawa, atas keseluruhan keterangan, kes prima facie dibuktikan G dan tertuduh dipanggil untuk memasuki pembelaannya. Pembelaan tertuduh yang memilih untuk memberi keterangannya dengan mengangkat sumpah, adalah penafian terutamanya penafian menerima panggilan daripada pengadu dan menyelitkan kemungkinan bahawa seorang yang lain yang terlibat. Pada peringkat pembelaan ia dicadangkan bahawa pemberi maklumat H menggunakan nama lain dan memperkenalkan fakta bahawa dia berkahwin dan bahawa suaminya adalah orang lain yang mungkin meletakkan dadah tersebut di dalam kereta tersebut. Dalam cara yang sama ia juga dicadangkan bahawa kereta yang dipandu oleh tertuduh bukan disewa olehnya dan bahawa penyewa sebenar kereta tersebut, nama yang terpampar di dalam I dokumen yang diserahkan sebagai keterangan mengenai sewa (dokumen tersebut), berbohong apabila dia memberi keterangan bahawa kereta tersebut tidak disewa olehnya (penyewa yang didakwa) dan bahawa dia tidak menandatangani dokumen tersebut. Menurut tertuduh, kereta tersebut bukan di dalam milikannya pada pagi 1 Disember 2000. Tertuduh memberi

keterangan bahawa dua orang Cina telah berjumpa dengan tertuduh dan mengambil kereta tersebut pada pagi tersebut. Pembelaan juga berhujah bahawa terdapat jurang di dalam kes pendakwaan kerana tidak terdapat masa yang tepat yang tertuduh boleh meletakkan dadah tersebut di dalam kereta di mana ia dijumpai. Oleh itu pembelaan memutuskan bahawa keterangan tersebut adalah ikut keadaan dan beban lebih berat ke atas pendakwaan.

Diputuskan, mensabit dan menghukum tertuduh di bawah s 39B(2) Akta Dadah Berbahaya 1952:

(1) Keterangan pemberi maklumat sama seperti agen provokatur kerana polis telah menggunakannya untuk membuat permintaan untuk dadah tersebut yang menyebabkan tertuduh membawa dadah tersebut ke tempat perjumpaan yang telah diatur. Percubaan tertuduh untuk mencadangkan bahawa terdapat orang yang lain yang patut dipanggil oleh pendakwaan pada peringkat pembelaan apabila tiada apa-apa dinafikan pada peringkat kes pendakwaan kelihatan seperti percubaan untuk membentuk kesangsian berupa khayalan (lihat perenggan 14 & 41).

(2) Apabila seseorang yang namanya terpampar di dalam dokumen untuk menyewa kereta tersebut (penyewa yang didakwa) menafikan apa-apa pengetahuan mengenai sewaan tersebut dan terhadap tandatangan dokumen sewa, tiada cubaan yang dibuat oleh tertuduh untuk mencabar keterangan tersebut dan untuk meminta bukti ketat tandatangan tersebut di bawah s 67 Akta Keterangan 1950 ('Akta tersebut') pada peringkat pendakwaan. Pembelaan hanya membangkitkan persoalan kesangsian mengenai tandatangan semasa pemeriksaan utama tertuduh. Kesemua ini sama seperti memohon mahkamah untuk membuka kembali kes pendakwaan. Walau bagaimanapun, nota prosiding menunjukkan bahawa keterangan mengenai penyewa yang didakwa diterima hampir secara menyeluruh. Sekali lagi mahkamah hanya dijemput untuk mempertimbangkan s 73 Akta tersebut pada akhir kes untuk pembelaan. Ini sebenarnya juga mengarahkan kepada cadangan bahawa mahkamah patut memanggil kembali saksi-saksi atau mempertimbangkan untuk memanggil saksi-saksi pakar. Walau bagaimanapun, tertuduh tidak dapat menjelaskan mengapa penyewa yang didakwa yang adalah kawan kepada teruduh akan menafikan menyewa kereta tersebut (lihat perenggan 42–44).

(3) Keterangan tertuduh tidak membantu di dalam melepaskan apa-apa kesangsian atas imbangan kebarangkalian. Pergerakan tertuduh adalah konsisten dengan keterangan pemberi maklumat bahawa dia menjangka tertuduh bukan versi tertuduh bahawa dia atas permintaan

A suami pemberi maklumat menghantar wang kepada pemberi maklumat. Jika betul ia tidak menyangkal fakta bahawa dadah tersebut berada di dalam kereta. Peranan yang menyumbang, jika ada; dari suami pemberi maklumat dan kedua-dua lelaki yang tidak dikenali yang mengambil milikan kereta tersebut patut dijelaskan pada
B peringkat permulaannya. Dekatnya dan nexus dadah tersebut dengan tertuduh menunjukkan bersama dengan keterangan ikut keadaan menunjukkan bahawa tertuduh hendak menghantar dadah seperti yang diminta (lihat perenggan 45).]

C **Notes**

For cases on informer, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2784–2785.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

D

Cases referred to

Namasiyiam & Ors v PP [1987] 2 MLJ 336 (refd)
Ng Yiu Kwok & Ors v PP [1989] 3 MLJ 166 (distd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1 (refd)
E *PP v Dato' Seri Anwar bin Ibrahim* [1999] 2 MLJ 1 68 (refd)
PP v Teh Cheng Poh [1980] 1 MLJ 251 (folld)
Ramli bin Kechik v PP [1986] 2 MLJ 30 (refd)
Reg v Sang [1980] AC 402 (refd)
Teja Singh & Mohamed Nasir v PP [1950] MLJ 71 (refd)

F

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37A, 39B(2)
Evidence Act 1950 ss 47, 48, 65(1)(c), 67, 73

B Sarala Pillai (Deputy Public Prosecutor, Attorney General's Chambers) for the
G *prosecution.*
Bachan Singh (Bachan & Kartar) for the accused.

Heliliah J:

H

[1] The charge against the accused is as follows:

Bahawa kamu pada 2 Disember 2000, jam lebih kurang 9 malam, di kawasan Jalan Aman, Off Jalan Tun Razak, dalam daerah Sentul, dalam Wilayah Persekutuan
I Kuala Lumpur, telah mengedar dadah berbahaya iaitu 29.95g campuran heroin dan monoacetylmorphines (8.26g heroin dan 21.69g monoacetylmorphines), oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] On 2 December 2000 SP4 attached to the Jabatan Narkotik IPK Kuala Lumpur was in charge of an operation to conduct an ambush. Based on an information received from a female Chinese one Dia Siew Hua (SP10) who had been arrested at 4am on the same day it was made known that an Indian male known by the name Rames would be able to provide her with the drug heroin.

[3] At about 9pm on that same day SP4 and a team of police personnel from the same Jabatan Narkotik IPK Kuala Lumpur apprehended a white Proton Wira bearing the registration No NAT 7617 with two male Indians inside. The car was apprehended at Jalan Aman off Jalan Tun Razak, Kuala Lumpur.

[4] The evidence of prosecution witness SP4 was that based on the information given by SP10, she was directed to contact the accused by telephone in the presence of SP4 and one Sub Inspector Teo (SP8). The latter was to be present as an interpreter. According to SP10 in her conversation with the person known as Rames the latter had requested for more time to deliver the requested drug as he was then outside Kuala Lumpur and that he would be in touch with her again by telephone.

[5] Apparently a few hours later the said Rames did get in touch with her again and had informed SP10 that the drug was available and would be handed to her at an area at Jalan Aman off Jalan Tun Razak. According to SP10 Rames would be using a white Proton Wira. On the basis of the abovementioned information the ambush party was arranged.

[6] During the ambush the white Proton Wira bearing registration No NAT 7617 was apprehended.

[7] From the evidence it is indicated that the police car was positioned such as to intercept the vehicle bearing registration No NAT 7617. The police then approached the car where two persons were seen sitting in the car. According to SP4 he identified himself and directed the two persons to alight from the car. The person seated behind the steering was subsequently identified as Rames a/l Subramaniam and the passenger SP5. SP4 had stated as part of his examination-in-chief that 'saya ada bertanya kepada kedua-duanya sama ada terdapat barang-barang dalam kereta tetapi kedua-duanya mendiamkan diri. Saya kemudian menjalankan pemeriksaan ke atas kereta NAT 7617 di hadapan kedua-dua lelaki India dan saksi polis yang mana saya jumpai satu beg kertas bercop 'Teddy Team' diletakkan di bawah tempat duduk penumpang hadapan kereta. Saya kemudian ambil dan dapati dalamnya satu bungkusan keratan akhbar tulisan Bahasa Cina dan bila dibuka terdapat

dalamnya satu paket plastik besar berisi bahan disyaki dadah heroin'. SP5 in his evidence stated, inter alia, 'kami ditunjukkan barang dan diberitahu di mana barang itu dijumpai'.

[8] SP7 the chemist attached to Jabatan Kimia Malaysia under took a proper analysis of the substance found and established that it was found to constitute a mixture of 8.26g heroin and 27.69g monoacethylmorphine as stated in the charge.

[9] The evidence that was led by the prosecution was based primarily on the information supplied by SP10 who also played a role in contacting a person by the name of Rames. There has also to be considered the evidence of SP8 whose evidence is relied upon to corroborate the conversation that was said to have transpired between SP10 and the person whom she contacted and who had apparently been Rames. SP9 is the witness who at the material time is the owner of Syarikat City Wheels Rentals Sdn Bhd from whom the car NAT 7617 was hired. The document ID21/P21 that provided the information as to the hirer is a document that was challenged by the defence even at the stage of the case of prosecution. SP6 who had been called earlier gave evidence that a statement made by him had been recorded by a police inspector who had informed that his name had been identified as the hirer for the period between 18 November 2000 and 18 December 2000. SP6 had denied any knowledge of hiring although his name Stephen Lourdes was found to be written in ID21/P21. He had also denied that he had hired the car and that he himself had signed the document ID21/P21. He had stated that the signature was not his.

[10] In order to determine whether the prosecution had established a prima facie case the evidence of the aforementioned witnesses had to be evaluated. In the course of doing so the alleged infirmities in the prosecution's case posed by learned defence counsel have also been evaluated. The first infirmity alleged is that of the evidence of PW10. PW10 could be categorised as a *participe criminis* in the real sense but akin to an agent provocateur. It was from her that the police obtained a telephone number and it was from her information that police caused her to contact a person whose name was identified as Rames.

[11] The following are the relevant parts of her evidence:

> 2 Disember 2000 saya ditahan di IPK, Kuala Lumpur.
>
> Apa sebab ditahan:
>
> Semasa memandu kereta pukul 1 lebih saya ditahan dan dikatakan ada barang dalam kereta.
>
> Polis kata barang itu dadah. Saya dibawa ke IPK Tingkat 6.

Beg saya dikeluarkan. Telefon bimbit dan buku telefon dikeluarkan.

Polis tanya sama ada saya tahu ada dadah dalam kereta.

Saya kata saya tak tahu.

Saya ditanya siapa orang yang ada dalam senarai buku telefon dan saya diminta telefon mereka satu per satu.

Kemudian saya ikut kata polis dan telefon satu per satu.

Sebelum ditangkap saya kenal seorang bernama Rames.

Saya kenal dia sebab dia selalu cari teman lelaki saya di luar.

Kadang-kala saya jumpa Rames.

Saya tak tahu apa yang dia selalu jumpa Rames. OKT dicamkan

Senarai telefon:

Dalamnya ada nama Rames.

Saya ada call Rames mengikut arahan polis.

Nama pegawai polis itu Roslan (SP4) juga boss & Teo (SP8).

Polis wanita tak ada.

Apa berlaku dalam percakapan telefon?

Polis ajar saya memberitau kepada Rames bahawa barang tidak ada lagi dan minta dia datang.

Rames kata:

Dia akan telefon saya.

Tidak lama kemudian telefon mendering. Telefon dipegang polis dan saya diminta menjawab telefon itu.

Saya diberitahu dia akan sampai di Wisma Damai satu jam lagi. Dia tak cakap apa-apa lain.

Semasa saya kata tidak ada barang lagi saya diajar polis dan saya ikut sahaja.

Kemudian saya dibawa ke rumah saya di Wisma Damai.

Saya ada beritahu polis bahawa Rames ada kata dia akan pergi ke Wisma Damai.

Wisma Damai dekat di suatu emporium di Jalan Ampang. Ada junction. Saya tak pasti jalan.

Shopping Emporium itu dekat City Square.

Yang membawa Insp Teo dan seorang wanita polis Cina — nama tak tahu.

Sampai di Wisma Damai saya bagi tahu Teo rumah saya di situ.

Apa jadi pada arrangement yang Rames akan sampai?

Saya ada naik ke atas. Saya beritahu Teo Rames akan sampai dan saya ada tunjuk tingkat bawah.

Tingkat bawah itu main entrance.

[12] From the evidence of SP10 there was no indication that the person who had received the call made by SP10 at the instructions of the police did not acknowledge her. SP8 a police officer gave evidence as he had been assigned to be an interpreter to SP10. However it would appear from the evidence he gave that he did not have to interpret for her as the conversation that he has heard to have transpired between SP10 and the person known as Rames had taken place without the necessity of any interpretation from him. During examination-in-chief he stated, inter alia:

Saya diperkenalkan oleh C/I Roslan kepada wanita/ perempuan itu. Saya kenalkan Dia Siew Hua. Saya dimaklumkan wanita itu ditangkap sebelah pagi oleh kerana memiliki dadah heroin dan berjanji untuk bekerjasama bagi satu projek syndicate pengedaran dadah. Dia memberitahu nama orang itu ialah Rames.

Perempuan Cina itu kata ia boleh berhubung melalui telefon bimbit. Dia Siew Hua dicamkan. C/I Roslan meminta saya beritahu Dia suruh berhubung terus dan dia terus berhubung dan dapat cakap dengan Rames. Dalam perbualan dia kata 'Rames ada barangkah?'. Jawapannya 'Ada, tapi kena tunggu'. Semasa dia bercakap dengan pihak sebelah sana saya ada dengar kerana ada di tepi sebelah perempuan itu.

Selepas itu saya bagi tahu kepada C/I Roslan mengenai perbualan itu. Selepas itu saya diminta standby di Jabatan Narkotik IPK Kuala Lumpur di pejabat C/I Roslan bersama dengan wanita Cina itu.

Lebih kurang 7 malam pada hari yang sama panggilan telefon masuk di telefon bimbit kepunyaan Dia Siew Hua. Dia terus dengar bersama saya. Mengikut Dia, Rames yang panggil dan dikatakan Rames telah sampai di tempat biasa. Rames bertanya 'Sudah sampai ke?'. Manakala Dia menjawab 'Saya akan sampai tak lama lagi, saya dalam perjalanan'.

Dia kata barang dadah sudah sampai dan barang itu akan sampai di tempat biasa di Jalan Aman.

During cross examination he stated, inter alia:

No telefon bimbit Dia tidak saya ingat. Saya juga tak ingat nombor telefon yang dikatakan dibuat (ie addressee).

Saya tidak kenal OKT sebelum dia ditangkap.

Sebelum ditangkap saya tidak pernah bercakap dengan OKT.

Bagaimana tahu Rames yang jawab

Dia ada sebut namanya Rames. Semasa telefon sudah Dia sebut nama 'Rames'.

Orang yang menjawab itu tidak menyebut namanya semasa saya mendengar di tepi Dia.

Adakah Dia memberitahu nombor kereta semasa memberi maklumat?

Ya, Dia ada memberi nombor kereta.

Saya dengar bersama Cik Dia.

Apa yang dikatakannya?

Rames, ada barangkah?

Ada catatkan soalan yang ditanyakan Dia?

Tiada.

Apa nombor kenderaan tersebut?

Saya tak pasti, tak ingat.

C/I Roslan tahu saya membawa Dia ke Apartment Jalan Damai.

Dia dibawa ke tempat sasaran dahulu sebelum dibawa ke Apartment Damai.

[13] The evidence of SP8 and SP10 revealed that the person by the name of Rames was identified. There was a request for the *barang* but the nature of the *barang* was not mentioned in the conversation. Neither was there any mention about quantity or price of the *barang*.

[14] SP10 is akin to an agent provocateur in the sense that the police had used her to make a request for the *barang*. A white Proton car was also identified in the course of the conversation.

[15] Both the evidence of SP10 and as supported by the evidence of SP8 raise the issue of entrapment. SP10 could not be termed an accomplice but was intentionally made by the police to cause another person to bring the *barang* which in the circumstance of this case turned out to be heroin.

[16] In *Ng Yiu Kwok & Ors v Public Prosecutor* [1989] 3 MLJ 166, at p 168 Hashim Yeop A Sani CJ (Malaya) as he then was stated, inter alia:

> The court should only be concerned with evidence to see if they are admissible, not when or how such was obtained.

[17] This statement was also referred to in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [1999] 2 MLJ 1 68. The issue here is really whether the court could exercise discretion to exclude evidence improperly or unfairly obtained from the accused himself after the commission of the offence.

[18] In *Reg v Sang* [1980] AC 402, Lord Diplock had stated at p 436:

> ... Your Lordships should, I think make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.

[19] And further in the same judgment, Lord Diplock's statements are as follows:

> However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. If Your Lordships so hold you will be reverting to the law as it was laid down by Lord Moulton in *Rex v Christie* [1914] AC 545, Lord du Parcq in *Noor Mohamed v The King* [1949] AC 182 and Viscount Simon in *Harris v Director of Public Prosecutions* [1952] AC 694 before the growth of what I believe to have been a misunderstanding of Lord Goddard's dictum in *Kuruma v The Queen* [1955] AC 197.
>
> I would accordingly answer the question certified in terms which have been suggested by my noble and learned friend, Viscount Dilhorne, in the course of our deliberations on this case. (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur.

[20] In this context the then Supreme Court had the opportunity in *Namasiyiam & Ors v Public Prosecutor* [1987] 2 MLJ 336 to consider a similar issue that is the extent of participation by an informer in assisting the police to lay a trap and there were discussions on the role of an agent provocateur as well as an informer. Additionally certain statements in *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71 also serve to be useful as found in the following passages:

Sir Roland stated that he could find no reference to agents provocateurs in the English text books and suggested that the reason for this was that the evidence of such persons was never used in England. I find, however, the following passage in *Roscoe's Criminal Evidence*, (15th Ed) p 156:

> *Agents provocateurs, spies, informers, detective & etc not accomplices*. Such persons employed in entrapping criminals 'are entirely distinguished in fact and in principle from accomplices', per Maule J, *Mullins* 3 Cox CC 526: spy on Chartists, 1848; 'and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators.' Followed in *Bickley* 2 Cr App R 63; 73 JP 239; 53 SJ 402, 1909: woman police spy buy noxious drug.

The following passage also appears in *Phipson on Evidence*, (8th Ed) p 478:

> The rule requiring the corroboration of accomplices does not apply to two classes of accomplices: (a) *Informers* — ie persons who have joined in, or even provoked, the crime as police-spies (*R v Bickley* 73 JP 239; or the police, who have assented thereto, *R v Heuser* 6 Cr App R 76);...

The head note to the case of *Rex v Bickley* referred to in the above extracts reads as follows:

> The evidence of a police spy or agent provocateur is not that of an accomplice and does not require corroboration.

It appears from the extract above quoted that the learned author of *Roscoe's Criminal Evidence* classed *agents provocateur* in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him. In the present case the police witnesses were both detective corporals who were carrying out the instructions given to them. There is nothing disreputable about them. The worst that might be said about them as witnesses is they might naturally wish their efforts in carrying out their instructions to be successful and they might, therefore, be expected to have a strong bias in favour of the prosecution case. But the learned president has said this about them in his grounds of judgment:

> I take this opportunity of reaffirming how impressed I was with the witnesses called for the prosecution. It seemed to me that there was nothing in their manner from which it could be inferred that they had in any way been wrongfully coached, but on the contrary they were honestly trying to tell what they had seen and heard; where they didn't know they didn't hesitate to say so. It was this feature about them which prompted me to say in my judgment that even if they had been uncorroborated accomplices I should have had no hesitation in acting on their testimony after careful warning.

The president's view of the evidence of the witnesses in question is supported by the record. These three witnesses di not each tell exactly the same story but each gave his version of what he saw and heard from his own particular point of view and I

A can detect no trace of any exaggeration or of attempts to improve the case. I am not prepared to hold that the evidence of these witnesses is not acceptable simply because the learned president has described them as having adopted the role of 'at the most of agents provocateurs'. I think the true answer to this part of the argument on behalf of the appellants is contained in the following passage from the judgment of Lord Alverstone CJ in *Rex v Mortimer*:

B

> I do not like the police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in consequence of the trap are nonetheless unlawful.

C

In support of the contention that these witnesses were actually accomplices Sir Roland Braddell relied on the Indian cases of *Md Usuf Khan v Emperor in re Lakshminavayana Aiyer* and *Queen Empress v Javecharam*. In the last of these cases the court held the witness in question to be an accomplice but with some doubt and in the former two cases the facts did not show the witnesses in question to be

D entirely free from some participation in the criminal design. I think the law is correctly stated in the case of *Emperor v Chaturbhuj Sahu* where the head note reads as follows:

> A person who makes himself an agent for the prosecution with the purpose of
E discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its
F commission is an accomplice requiring corroboration.

In the judgment in this case the following passage appears to me to be of practical value in distinguishing between accomplice and spy:

> It may sometimes be difficult to draw the line of discrimination between an
G accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way: If the witness has made himself an agent for the prosecution, before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been
H committed.

[21] At the prosecution stage there is no hint or suggestion that PW10 is not a credible witness despite the prosecution's disclosure that there were
I criminal charges for drug possession against her. No indication was given as to the outcome of those charges and neither was it raised by the defence.

[22] The next issue on the alleged infirmity in the prosecution's case is with regard to the car. The white Proton Wira NAT 7617 according to the

prosecution's case had been rented under an assumed name by the accused. SP6 who lives in the same neighbourhood as the accused and who has been known to the latter for a period of eight to ten years gave evidence that it was made known to him, when the police was recording a statement from him that the car had been hired for the period between 18 November 2000 and 18 December 2000. The document first introduced as ID21 indicated that the car had been hired from City Wheels Car Rental Sdn Bhd. SP6 denied any knowledge of having signed the document. His assertion was that the handwriting was not his. The relevant portions of the evidence are as follows:

A: Semasa Insp. Ho mengambil statement dari saya dan semasa Insp. Ho memberitahu saya kereta ini didaftarkan atas nama saya, ketika itu baru saya tahu kereta itu didaftarkan atas nama saya.

Q: Ada tak pada bila-bila masa awak dan Rames menyewa kereta dari syarikat.

A: Sekali.

Q: Nama siapa digunakan sebagai penyewa.

A: Atas nama saya.

Dokumen dirujuk, photostat copy City Wheels Car Rental Sdn Bhd Id. 21.

Nama Stephen Lourdes ada.

No kereta dalam document dirujuk.

Ia adalah sama dengan nombor kereta NAT 7617 dalam gambar.

Tandatangan juga dirujuk.

Q: Tandatangan itu siapa?

A: Bukan tandatangan saya.

Q: Pernah isi borang ini? Tulisan siapa dalam borang itu?

A: Bukan tulisan saya.

Lihat period of time.

Date out 18 November 2000 dan date in 18 December 2000.

Q: Oleh kerana adanya butir-butir, bolehkah awak sahkan awak ada menggunakan kereta ini pada tempoh itu iaitu 18 November 2000 dan 18 December 2000.

A: Tidak.

Q: Pada awal December 2000 di mana awak ada.

A: Saya berada di Johor.

[23] Again during cross-examination of SP6 no questions were raised by learned counsel for the defence on the issue of the document not being in his

handwriting. Instead it went on the tangent whether SP6 being a technician had the occasion to service cars sent by Rames to his work place.

[24] On the same issue of the car the police brought forth the evidence of SP9 who owns Syarikat City Wheels Rentals Sdn Bhd and who runs the business of renting cars, buying and selling cars and insurance connected therewith. ID21 is a photostat copy of the form that is usually used by his company in the business of renting out cars to hirers. According to SP9 the original form for ID21 had been transmitted to the Inland Revenue Department since 12 months had lapsed. At that stage it was averred by the prosecution that the object of producing ID21 was to establish whether SP6 knew of the existence of the document as opposed to establishing the truth of the contents of ID21.

[25] In cross-examination SP9 was questioned as to whether he had tried to evade giving evidence but this was strongly denied. The learned deputy public prosecutor in examination-in-chief and cross-examination revealed the following. SP9 was present alongside when one Siti Zaharah, his clerk, had filled the form. The form was duly filled with the name Stephen Lourdes a/l Mailimoney (SP6). According to SP9 the person who came to hire the car could be identified as the accused but he had produced for that purpose a photostat copy of an identity card and the clerk Siti Zaharah had filled the original copy of ID21 based on the particulars in the photostat copy of the IC. The relevant portion of the evidence is as follows:

> Pada 18 November 2000 ada seorang lelaki bernama Rames membawa sekeping photocopy I/C untuk menyewa kereta.
>
> Saya arahkan kerani saya untuk membuka rental agreement, kerani itu Siti Zaharah. Siti Zaharah mengisi borang ID21A berdasarkan photocopy I/C. Berdasarkan ID21A rentalnya ialah atas nama Stephen Lourdes.
>
> Bagaimana tahu nama Rames.
>
> Bila saya meminta I/C Rames dan ia memberi salinan photostat I/C dan ia memberitahu salinan I/C itu hakmiliknya sendiri. Ia menyatakan nama samarannya Rames.
>
> OKT dicamkan.

[26] During cross-examination SP9 explained that he had brought the original copy of ID21 together with an invoice to see Chief Inspector Hock but had declined to give the originals to that said Inspector. SP9 had also reiterated in cross-examination that the person who signed the original form was the person identified as Rames. Also to be considered is the following evidence:

Adakah kebiasaan menggunakan photostat dan menyewa kenderaan I/C dan wang sekali?

Kita menerima photocopy. Jika seseorang membawa I/C photocopy syarikat saya akan membenarkan penyewaan.

Gambar photo I/C sama dengan Rames yang menunjukkan kepada kami. I/C itu berlainan.

ID21B wang diterima.

Selain voucher perlu disimpan rekod wang dimasuk dalam syarikat saya.

Saya menghantar dokumen ke pejabat Hasil Dalam Negeri: ID21A.

Selepas 2 tahun 11 bulan.

[27] At the stage of the unfolding of the prosecution's case learned counsel for the defence focussed his challenge on the introduction of ID21 on the basis that it was not primary evidence of the documents. The insistence of the learned deputy public prosecutor was that the matter should be dealt with at the submission stage at the end of the case for the prosecution. The statement was admitted on the basis of s 65(1)(c) of the Evidence Act 1950 ('EA 1950') since the original was sent to Inland Revenue Department. The clerk who filled in the particular had left the service of City Rentals.

Section 65(1)(c) provides:

65.

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(c) when the original has been destroyed or lost, or when the party *offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time*;

[28] The point to be noted however was that on the material date it was not disputed that Rames was the person actually driving the car NAT 7617 at the time when police laid ambush.

[29] SP5 is the witness who had sat as a passenger. The salient points of his evidence was that:

(1) On 1 December 2000 he was with Rames whom he had befriended for more than five years. According to SP5 on 1 December 2000 SP5, Rames, his wife, a friend by the name of Selvi and two younger sisters of Rames and another young man had left for Genting and decided to spend the night there. They left for Genting on 1 December 2003 in white Proton Wira car NAT 7617.

(2) SP5 and Rames left Genting on 2 December 2003 in the same car for the purpose of purchasing food and a sweater and to fetch more clothing items from Rames's house. However before they could do so they were apprehended at a place next to City Square.

(3) SP5 knew the car was a hired car used by Rames.

(4) The car had been used for about a month. Three or four days before the material date he had seen the car being used by another person.

(5) After leaving Genting SP5 realised that a stop was made at Setapak for a drink. During that stop SP5 did recall that Rames received a call on his handphone. He could not recall the time and while Rames was engaged in the conversation, Rames had moved out of earshot and the conversation was brief.

[30] In response to the questions posed by learned counsel for the defence, SP5 did indicate that to his knowledge there was some defect in the locking system of the car. These questions appear to be intertwined to the fact that the car had been parked at the basement of the hotel where they had stayed on the night of 1 December 2000.

[31] Some questions had also been posed to SP5 regarding the circumstances surrounding the arrest of SP5 and Rames. Rames according to SP5 was handcuffed and made to lie downwards on the grounds. SP5 was also handcuffed and was made to stand slightly away from the car. The police had repeatedly posed Rames with the question '... ada barang dalam kereta'. According to SP5 Rames had replied that he did not know. SP5 stated that a search was made and something was found after which both SP5 and Rames were brought to the car. Apparently the item found was pointed out to both SP5 and Rames and the *barang* was found under the front passenger seat. According to SP5 the *barang* that was found was opened in their presence while they were looking on. According to SP5 that was the first time that he saw the 'dadah berwarna rose' and he stated that the *dadah* did not belong to him.

[32] At the end of the prosecution's case the question is whether a prima facie case has been established. The evidence of SP10 has been given support by the evidence of SP8 in the following terms:

> Saya diperkenalkan oleh C/I Roslan kepada wanita/perempuan itu. Saya kenalkan Dia Siu Hua. Saya dimaklumkan wanita itu ditangkap sebelah pagi oleh kerana memiliki dadah heroine dan berjanji untuk bekerjasama bagi satu projek syndicate pengedaran dadah. Dia memberitahu nama orang itu ialah Ramesh.
>
> Perempuan Cina itu kata ia boleh berhubung melalui telefon bimbit. Dia Siew Hua dicamkan. C/I Roslan meminta saya beritahu Dia suruh berhubung terus dan dia terus berhubung dan dapat cakap dengan Ramesh. Dalam perbualan dia kata

'Ramesh ada barangkah?'. Jawapannya 'Ada, tapi kena tunggu'. Semasa dia bercakap dengan pihak sebelah sana saya ada dengar kerana ada di tepi sebelah perempuan itu.

Selepas itu saya bagi tahu kepada C/I Roslan mengenai perbualan itu. Selepas itu saya diminta standby di Jabatan Narkotik IPK Kuala Lumpur di pejabat C/I Roslan bersama dengan wanita Cina itu.

Lebih kurang 7 malam pada hari yang sama panggilan telefon masuk di telefon bimbit kepunyaan Dia Siew Hua. Dia terus dengar bersama saya. Mengikut Dia, Rames yang panggil dan dikatakan Ramesh telah sampai di tempat biasa. Rames bertanya 'sudah sampai ke?'. Manakala Dia menjawab 'Saya akan sampai tak lama lagi, saya dalam perjalanan'.

Dia kata barang dadah sudah sampai dan barang itu akan sampai di tempat biasa di Jalan Aman.

[33] During cross-examination SP8 reaffirmed that the name of the person with whom SP10 was engaged in conversation was a person who responded to the name Rames. He had also stated that during the conversation that transpired between SP10 and the person at the other end of the line he did not to do any interpretation as SP10 was able to engage in the conversation without his assistance to interpret. SP8 however could not supply the mobile telephone number that SP10 had contacted.

[34] Throughout the proceedings the telephone number of SP10 and that of the person identified as Rames were not disclosed by the prosecution witnesses. However the evidence of SP5 indicated that in the course of the journey from Genting to Kuala Lumpur Rames did use a mobile phone for the purpose of a call. The case applicable here with regard to the evidence of SP8 is that of *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251 that is in the absence of contradiction or anything improbable in his evidence he should be accepted as a reliable witness.

[35] The central issue relates to the possession and knowledge of the drugs. The evidence of SP5 excludes any suggestion that he had any link to the heroin that was found under the front passenger seat. Neither was there any suggestion that the passengers who were transported in the car the previous day could have links to the drugs. It is found that the facts of this case differ from that of the case in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1. However with SP5 not having any link to the drugs found the judicial statements of Arifin Zakaria FCJ in delivering the judgment of the court is found to relevant and applicable in this case. The statements are:

> But mere custody and control is not sufficient to establish possession for the purpose of the Act. There has to be established knowledge of such drug by the respondent. In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:

'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.

And further down on the same page he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

It is trite that what constitutes 'possession' under s 37 of the Act is a question of law. (See *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. And in relation to drug found in a vehicle Shankar J in *Pendakwa Raya v Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557, after considering a number of authorities, stated:

> ... those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v Public Prosecutor* at p 233:

> If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ...

Again, at p 234:

> I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle.

Therefore, the presence of the three packages in the car without a plausbile explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. (See also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:

> 21. For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1978–1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

In *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, the Singapore Court Appeal again propounded on the question of knowledge necessary to establish possession and at p 541 states:

Knowledge of drugs

A The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.

B In *Tan Ah Tee*, Wee Chong Jin CJ, delivering the judgment of the court, said ([1978–1979] SLR 211 at 217–218; [1980] 1 MLJ 49 at p 52):

> Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag
C and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning
D of the Act.
>
> The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In *Warner*
E the following question was posed to Their Lordships:
>
> > Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware if its true
> F nature.
>
> At p 367 Lord Reid addressed the issue as follows:
>
> > The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of
> G the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused
> H knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.
>
> I In the same case Lord Morris answered the question in following manner:
>
> > If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is

some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[36] In this case the fact of the car being in the possession of the accused (or DW1) was then still consistent with the version of PW10 that a request had been made for the drugs. At the stage of the prosecution's case PW5 evidence again corroborated the fact that on the way to the area identified for the delivery of the drugs certain phone conversation transpired PW5 confirmed that the place that DW1 had stopped was the very place at which it was stated by SP10 that the drugs would be brought to by the person whom she referred to as Rames.

[37] The evidence of the prosecution is that Rames had rented the car for a certain period. On the material date he was driving the car. The evidence of SP10 is supported by the very action of the OKT in the sense that there are the acts of 'transporting' or 'delivering' the heroin within the meaning of the definition of 'trafficking' as found in s 2 of the Dangerous Drugs Act 1952 ('DDA 1952').

[38] On the totality of the evidence as considered above it is found that a prima facie case was established. The accused was called upon to enter his defence and he elected to give his defence under oath.

[39] Another witness was also called for the defence. Generally it is found that the defence was a denial namely a denial of having received a call from SP10 as well as making a call back to SP10 bearing in mind the SP5 had personally seen the accused speaking on the mobile phone.

[40] At the defence stage there was injected the possibility that another person was involved. The role of the person as suggested by learned counsel for the defence was that this was the person who should have been taken in by the police. The person by the name Kow Kia is said to be the husband of SP10. It would appear that this is an attempt to surprise the prosecution as

no such suggestion was made to SP10 during cross examination. During cross-examination of SP10 the questions put to SP10 were as follows (inter alia):

Q : Adakah teman lelaki awak menjalankan rumah pelacuran.

A : Ya.

Q : Rames kenalan kamu atau teman lelaki kamu.

A : Teman lelaki saya.

[41] Kow Kia is a Chinese with whom DW1 is supposed to be working for on a part time basis ferrying prostitutes between 8pm and 1–2am that is after his work as a car repossesser ends at about 4.30pm. If Kow Kia had played such an important role in the line of defence that is he is the person who may have placed the drug in the car, it is indeed of no avail for learned defence counsel only during submission at the close of the case for defence to assert that the prosecution should have called Kow Kia as a rebuttal witness. At the defence stage it was suggested that SP10 was known by another name that is Mimi and Kow Kia and Mimi are supposedly husband and wife. Admittedly at the prosecution stage a different counsel was representing DW1 but to suggest that there were two other persons who should be made available by the prosecution at the defence stage when nothing was denied at the stage of prosecution's case appear to be an attempt to create a form of fanciful doubt.

[42] In the same vein was the suggestion that SP6 was lying deliberately when he gave evidence during examination-in-chief that the car was not hired by him. At the stage there was no suggestion that the signature displayed in ID21A subsequently P21A was not that of DW1. In facts the notes of proceedings indicate that the evidence of SP6 was accepted almost in toto. He was primarity questioned about his work as a person who serviced the car.

Defence counsel had drawn to the attention of the court that the signature in D23 did not correspond to the signature ID21A/P21A. To be noted however is that the signatures of DW1 as appearing in P14 and P15 are curiously also different. They also differ from the signature in D23. It is the contention of learned counsel for the defence that court should then consider s 73 EA 1950.

Section 73 provides:

73.

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared

by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

(3) This section applies also, with any necessary modifications, to finger impressions.

[43] Some observation may be made. When SP6 denied categorically that he was not the person who signed P21A no attempt was made by the defence to challenge the evidence and that the proof of the signature should therefore be in compliance with s 67 of the EA 1950 and consequently resort should be made to invoke ss 48 or 47 of the EA 1950. SP9 whose evidence the court is invited not to accept testified that he saw his clerk filling in the particulars in P21A and that it was signed by DW1. No serious attempt was made to controvert this at the prosecution stage. Again the court was duly invited to consider s 73 at the end of the case for the defence. This in effect also points to a suggestion that the court should recall witnesses or even consider calling expert witnesses. Having seen the witnesses I did not consider that SP6 would be lying to frame his friend. The defence counsel has averred that it was not a case where the defence was suggesting a frame-up but even DW1 could not supply a reason why SP6 a friend would be making up a story that he did not hire the car. The circumstances of the case warrant a reference to *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 30. The statement of Mohamed Azmi SCJ (as he then was) in delivering the judgment of the court is referred to in the context whether this court should exercise its discretion to recall a witness or even to call an expert witness. The statement is as follows:

> The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence (see *Rengaswami Naicker*'s case). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its very nature the discretion to be exercised under s 425 CPC. depends on the facts of each case — the main consideration being the essentiality of the additional evidence to a just decision of the case.

A **[44]** In this case the defence has raised the question of doubt about the signature only during the course of the examination-in-chief of DW1. This is tantamount to an invitation to the court to reopen the prosecution's case. On record the evidence of SP6 remain uncontroverted.

B **[45]** In any event the defence raised its version of factual circumstances that the car was not in the possession of DW1 in the morning of 1 December 2000. According to DW2 two male Chinese met the accused DW1 to take away the car. Who then are the two Chinese who took the car? It is also noted that the call made by SP10 was sometime in the morning of 2 December 2000. The defence suggests that the gap in the prosecution's case seem to be C that there is no definitive time that the DW1 could have placed the drug in the car where it was found. However the defence concludes that the evidence here is circumstantial and hence the burden is heavier on the prosecution. The burden rests on the prosecution throughout the case to be that of establishing a case beyond reasonable cast. The evidence of DW2 does not D assist in casting any doubt on a balance of probabilities. The court is invited to infer that since the car was taken by the two male Chinese as averred therefore the possibility was that the drug was once again planted. In that sense the evidence of DW2 did not change the character of the defence. The telling evidence is that the movement of DW1 in the latter part of 2 E December 2000 was consistent with the evidence of SP10 that she was expecting DW1 rather than the version of DW1 that he at the instance of Kow Kia was delivering money to SP10. If so it did not negate the fact that the drugs were in the car and evidence of SP5 that he had no knowledge of the drugs remained uncontroverted. Once again the proximity and nexus of the drug to DW1 remained uncontroverted to indicate that DW1 with F circumstantial evidence did intend to deliver the drugs as requested. In the circumstantial evidence of this case the court has to weigh the evidence in its totality. The contributing role if any of the man called Kow Kia and possibly two other unknown male Chinese should have been elucidated at its earliest stage. D23 a statement recorded pursuant s 37A of the DDA 1952 does not G shed any light on DW1's defence.

[46] Having considered the evidence given by the defence, it is found that the prosecution had established a case beyond reasonable doubt. The defence had not on a balance of probabilities raised any reasonable doubt. The H accused is found guilty, convicted and the mandatory sentence prescribed under s 39B(2) imposed. In his plea for mitigation it was stated that he is a first offender and that he has a wife and elderly mother to support.

Accused found guilty under s 39B(2) of the Dangerous Drugs Act 1952.

I Reported by K Nesan